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No. 1268.

Office Supreme Court U. S.
FILED
MAR 20 1899
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Brf. of Roby for P. in E. (mo.)

Filed Mar. 28, 1899.

October Term, A. D. 1898.

United States Supreme Court.

JACOB FORSYTH, Plaintiff in Error,

vs.

HENRY F. T. VEHMEYER, Defendant in Error.

Brief Against Motion to Dismiss Writ of Error.

EDWARD ROBY,
Counsel for Plaintiff in Error.

Term No. 658.

United States Supreme Court.

JACOB FORSYTH, PLAINTIFF IN ERROR,

vs.

HENRY F. T. VEHMEYER, DEFENDANT IN ERROR.

Brief Against Motion to Dismiss Writ of Error.

Said Jacob Forsyth having died January 29, 1899, this brief is put in by and on behalf of Oliver O. Forsyth, his administrator, who has suggested the death and prayed to be admitted as a party, etc.

Pleading in Illinois is according to the Common Law.

Review may be had, in the Appellate Courts, by writ of error, or by appeal in the nature of a writ of error (in actions like this), which courts have jurisdiction, not only of questions of law, but also of questions of fact, to some extent. From the Appellate Court the case may be removed into the Supreme Court of the State, by writ of error or like appeal; but the Supreme Court of the State has jurisdiction to review (in actions like this) on questions of law only. (*Gravett* v. *Davis*, 92 Ill., 190, pp. 191, 192; *Moore* v. *Tierney*,

100 Ill., 207; *Wabash Ry. Co.* v. *Henks*, 91 Ill., 406; *R. R. Co.* v. *McMath*, 91 Ill., 104.)

This is an action of *Debt*, brought by Vehmeyer, in January, 1891, in the Superior Court of Cook County, upon a judgment of the same court, entered July 29, 1871, in favor of Vehmeyer against Forsyth.

Forsyth *pleaded* (in due form) a discharge in bankruptcy, granted to him December 30, 1880, by the United States District Court for Indiana.

Vehmeyer *replied* that the debt was created by fraud, within the meaning of the bankrupt act of the United States.

A jury was waived and the cause was submitted to the court for trial.

Forsyth proved his discharge in bankruptcy, granted December 30, 1880, as pleaded.

Vehmeyer proved that the files and record of the Superior Court of Cook County were destroyed in the great fire of Chicago of October 8 and 9, 1871; and that no copy of any pleading, or of the judgment, existed.

He produced an abstract, or private docket, made in the course of their business at the time, by Chase Brothers & Company, persons engaged in making abstracts of title to real estate, which is ruled in columns: "Names of Parties;" "Action;" "When Commenced;" "Date of Judgment;" "Amount of Judgment," and so forth. The names of the parties, and date and amount of the judgment being given, the *Action* given is *Trespass on the case.*

He produced a witness, who (from his recollection only) testified to the contents of the destroyed declaration and record of judgment. The latter was in the simplest form of a judgment for money, and defendant in error does not claim that there is anything in it tending to show fraud, except as it adjudged damages against Forsyth upon the declaration.

The *opinions* of the Appellate and Supreme Courts *of Illinois* are no part of the record (*Moore* v. *Williams*, 132 Ill., 591, p. 593; *Coalfield Co.* v. *Peck*, 98 Ill., 139, pp. 144, 145); but, pursuant to the rule of this court, the opinion of the Supreme Court of Illinois has been certified up, and that purports to give a copy of the opinion of the Appellate Court; which, in turn, purports to give a copy of the destroyed declaration, deduced from the oral testimony of the witness.

The following is a copy of the declaration as the testimony of the witness gave it:

"Henry F. T. Vehmeyer, *complainant*, by Buschel & Frake, his attorneys, complains of Jacob Forsyth, defendant, summoned in a trespass on the case;

For that whereas, heretofore, to wit: on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money, (to wit: the sum of $1,200,) falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord wood, (to wit: 200 cords) cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake and State of Indiana, ready to be shipped to Chicago, that one Eldredge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the 200 cords of wood, he the defendant, would immediately ship said cord wood to the city of Chicago; that the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant said sum of $1,000;

That the defendant shipped only the sum of 40 cords of wood to the said Eldredge, from which he, said Vehmeyer, received the sum of $6 per cord;

That the representations of the defendant falsely, were false and fraudulent; that he did not have, nor never did have, in the county of Lake, and State of Indiana, 200 cords of birch cord wood piled up and ready for shipment to the city of Chicago, to said Eldredge; but only had, neither in the county of Lake, nor anywhere else, the sum of 40 cords of birch cord wood which was shipped by the said defendant to the said Eldredge.

Wherefore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

The foregoing is all the evidence given by Vehmeyer to support his replication, that the debt of Forsyth was created by fraud, within the meaning of the bankrupt act.

It is apparent that the legal effect of the written record is a question of law (*Flannagan* v. *Pierson*, 42 Tex., 1; 1 *Thompson on Trials*, §§ 1,065, 1,067, 1,071); and that this question of law is a federal question, when

it arises upon a *plea* and proof of a discharge in bankruptcy, *and replication*, that the debt was created by fraud within the meaning of the bankrupt act of the United States.

In rebuttal, Forsyth produced an abstract, or private docket made in the course of their business, at the time, by Shortall & Hoard, persons engaged in making abstracts of title to real estate, which is ruled in columns, with column heads like the other, and is substantially identical; except as it shows indications of a little more accuracy and precision; and the kind of action given in the column headed *Action* is *Assumpsit*.

Forsyth offered testimony tending to prove that the plaintiff (Vehmeyer) did not make any claim of fraud on the trial in 1871; that no evidence tending to prove fraud was given on that trial; and that such point or question was not adjudicated at that trial.

These offers of testimony presented the matter in a variety of forms, and appear at five several places in the record. Objection was made by Vehmeyer in each case; the objection was each time sustained; and exception was duly saved in each instance.

Forsyth also offered testimony that at that trial in 1871, the court instructed the jury that no fraud had been shown in the case, and that it was the duty of the jury simply to determine the amount, if any, which Forsyth owed to Vehmeyer. Vehmeyer objected, and the court excluded the evidence, and Forsyth saved his exception.

The exclusion of the evidence, on which these exceptions were saved, was duly assigned for error in the Appellate and Supreme Courts of Illinois, both of which have adjudged that the exclusion was no error.

This is clearly a question of law. And as it is a question of law on which the effect of the act of Congress, upon the debt shown by the declaration and judgment of 1871, must turn, it is a federal question. Otherwise a state court, by giving an arbitrary or erroneous construction or effect to any evidence of debt,

could exclude any person from the benefit of the act of Congress, though clearly and of right entitled to it.

In *Palmer* v. *Hussey*, 119 U. S., 96, at page 98, in deciding a motion to dismiss the writ of error for want of jurisdiction, this court said (Mr. Chief Justice WAITE, delivering the opinion of the court): "The motion to dismiss is denied. Palmer * * * specially set up and claimed an immunity, under section 5,117 of the revised statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him. *This gives us jurisdiction*, since the exemption depends *on the construction and effect of section 5,117*, which provides that no debt created by the fraud of the bankrupt, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy."

Asserting and exercising jurisdiction, for the same cause, this court in *Neal* v. *Clark*, 95 U. S., 704, reversed a judgment of the Supreme Court of Appeals of Virginia; in *Noble* v. *Hammond*, 129 U. S., 65, it reversed a judgment of the Supreme Court of Vermont; in *Hennequin* v. *Clews*, 111 U. S., 676, it affirmed a judgment of the Court of Appeals of the State of New York (p. 684); and in *Upshur* v. *Briscoe*, 138 U. S., 365, it affirmed a judgment of the Supreme Court of Louisiana.

Counsel for Vehmeyer, in support of his motion to dismiss this writ of error, quotes from the opinion in the case, given by both the Appellate and Supreme Courts of Illinois (printed in 52 N. E. Reporter, 55, see p. 57, second column): "*Whether the judgment sued on was for fraud, is a question to be determined from the record. Flannagan v. Pearson, 42 Tex., 1.*"

In the case so cited, the record of a judgment, consisting of the pleadings and judgment entry against Flannagan, was given in evidence, and was by the trial court submitted to the jury for its decision, whether that record proved that the debt was created by fraud, and

the reviewing court held: "We think it was error to submit to the jury an issue as to whether the judgment was obtained for fraud or not. That question was to be determined *by the court* from an inspection of the record in the case including the pleadings." (*Flannagan* v. *Pearson*, 42 Texas, p. 2.)

This seems to demonstrate, that, from the view of the case taken by the counsel for Vehmeyer, in the trial court, as well as in the Appellate and Supreme Courts, and from the view taken by the trial, the Appellate and the Supreme Courts of Illinois there was no question of fact in the case, but only the question of law, whether the debt proved by and merged in the record of 1871, (proved by Vehmeyer) appeared by that record to be created by fraud, within the meaning of the bankrupt act, so as to except it from the effect of the discharge in bankruptcy, issued under and in pursuance of the bankrupt act.

The Chief Justice of the Supreme Court of Illinois, allowed the writ of error to remove the case to this court, and signed the citation attached to the record.

Doubtless he recognized that the question whether the discharge in bankruptcy released Forsyth from the debt proved by the judgment (whether that was in assumpsit or case) was the vital question in the action, and believed that that question was properly reviewed by the Supreme Court of Illinois; which had, in the case, jurisdiction of questions of law only; and that this court would have jurisdiction of the same vital question.

While the counsel for defendant in error has not included a formal motion to affirm in the draft of motion served on the undersigned, their brief closes with such a motion, and calls on plaintiff in error to state points on which the several courts of Illinois manifestly erred upon federal questions, and to cite authorities displaying such manifest error.

Two errors are manifest.

(1.) The courts of Illinois erred in holding that the declaration and judgment of 1871 as shown by Vehmeyer, proved that the debt, merged in the judgment, was created by fraud within the meaning of the bankrupt act, so that, as to that debt, Forsyth was excluded from the benefit of his discharge.

The courts of Illinois erred in holding that judgment to prove, as *res adjudicata*, or otherwise, that the debt was *created by fraud within the meaning and intent of the provisions of the bankrupt act of the United States.*

Neal v. Clark, 95 U. S., 704, pp. 708–9.
Wolf v. Stix, 99 U. S., 1, pp. 7–8.
Hennequin v. Clews, 111 U. S., 676, pp. 681–3.
Palmer v. Hussey, 119 U. S., 96, pp. 97–8.
Noble v. Hammond, 129 U. S., 65, pp. 68–70.
Upshur v. Briscoe, 138 U. S., 365, pp. 376–8.

(2.) The courts of Illinois erred in excluding the evidence offered by Forsyth tending to show that the judgment of 1871 was upon the debt only; and that it did not embrace any question whether that debt was *created by fraud within the meaning and intent of the provision of the bankrupt law of the United States.*

Russel v. Place, 94 U. S., 606, p. 608.
Packet Co. v. Sickles, 5 Wal., 580, p. 592.
Wells on Res Adjudicata; Secs. 200, 201, 215, 216, 297, 302.
Lawrence v. Hunt, 10 Wend., 80, p. 84.
Wood v. Jackson, 8 Wend, 9, p. 36.
2 Black on Judgments, Sec. 624.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.
1 Greenleaf on Ev., Sec. 532.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record it remains doubtful whether *the same* subject-matter was actually passed upon, it seems that parol evidence may be received to show the truth. So, also, if the pleadings present several distinct propositions, and the evidence may be referred to either or to all with the same propriety, the judgment is not conclusive, but only prima facie, upon any one of the propositions, and evidence aliunde is admissible to rebut it." (1 Greenleaf on Ev., 532.)

FIRST.

The first point is, that, giving the evidence produced by Vehmeyer the utmost scope that it will bear, it did not amount to evidence that the debt of Forsyth was created by fraud, *according to the sense of that expression in the bankrupt act;* and the courts of Illinois erred in assuming that it did amount to such proof, either as res adjudicata or as presumptive evidence.

Evidence that the action was "*trespass on the case,*" does not tend to show that it was for a debt created by fraud.

The action of assumpsit is an action of trespass on the case upon promises. An action for malicious injury to ones clothing, or other property, or for personal injury, or for the burning of grass or crops, or fences or buildings, or stacks, by sparks from a locomotive may be an action of trespass on the case. Those words, *trespass on the case*, do not imply a debt created by fraud, any more than the words, *action at law* would imply that the action is for a debt created by fraud.

The evidence of the contents of the first declaration

was, by the testimony of the plaintiff's attorney, who begun the former action as well as this,—testimony given after a neglect *for twenty-six years* (by the party who called him) to restore the burned record under the common law or under Section 2 of Chapter 116 of the Revised Statutes of Illinois of 1874, when in the nature of things, no man could remember that any particular words were or were not in the lost paper. (*Nichol* v. *Miller*, 37 Ill., 387, p. 410; *Marshall* v. *Peck*, 91 Ill., 187, pp. 189, 190.)

Neither the prejudice of the witness in favor of his client, nor the infirmities of memory after so many years of neglect, nor the fact that the law would not allow the witness to study out what was material for him to swear to and write it out in his closet and read such paper as his testimony, or look at such paper while testifying, (*1 Greenleaf on Ev.*, Sec. 436, 438; *Thompson on Trials*, Sec. 400), could add words which the witness did not speak, nor facts to which he gave no testimony. They could not put words into his mouth which he did not utter, nor supply material testimony which he did not give.

Therefore we must consider the declaration in the words above printed; *in issue by the general issue;* the verdict in words to which he testified:

"We the jury find the defendant guilty and assess the plaintiff's damages at $833.35;"

and the judgment in the words to which he testified:

"Therefore it is considered by the court that the plaintiff have and recover from the said defendants his said damages $833.35, in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefor."

If that declaration, issue, verdict and judgment, in the words given, without the addition of a syllable, does not prove that the debt was created by fraud, it was not proved.

That it was created by fraud within the meaning of the bankrupt act was an affirmative averment of the replication; it must be *proved*, or the repliant must be held to have failed in his proof.

U. S. R. S., Sec. 5,117. *No debt created by the fraud or embezzlement of the bankrupt*, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy: but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

Sec. 5,118. No discharge shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise.

Sec. 5,119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. (Statute of March 2, 1867, Ch. 176, Sec. 33, 34; 14 U. S. Statutes at large, 532, 533.)

This court has determined that certain principles govern the construction of these sections, and has established the most liberal construction in favor of discharge, and an extremely strict construction of the section of exceptions, and has applied these principles to the facts in a number of cases, often reversing the judgments of the highest state courts.

By application of the maxim *noscitur a sociis* and other rules of construction this court finds that the words "created by fraud" in the statute, are to be strictly construed, and allow no collateral latitude whatever; that they include only such frauds as are of the same grade of moral turpitude with embezzlement; and that frauds which involve less turpitude, or are incidental or collateral, so that the debt was not, in fact, created by the fraud itself, constitute no bar to the discharge; and that "such a construction of the statute is consonant with equity and consistent with the object and intention of the congress. * * * A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." (*Neal* v. *Clark*, 95 U. S., 704, pp. 708, 709.)

The judgment of the Supreme Court of Virginia was reversed by this decision.

In *Hennequin* v. *Clews*, 111 U. S., 676, this court reaffirms the above stated principles of Neal v. Clark (p. 681); and having mentioned the reasons leading to the first adoption of construction favorable to discharge (p. 679), and referred to decisions of state courts which were contrary to these principles (p. 680), and returned to the doctrine of Neal v. Clark, the court proceeds (p. 682): "The English authorities are more in accord with the decisions in this country which take a different view from our own on this question." The court then states cases where it would hold the debt discharged, of which the English case said: "no doubt this debt was incurred by fraud," (p. 683), and cites numerous English cases of like character. The court then says: "It is evident that the English courts regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt acts." The case then affirms "the liberal construction made in favor of the certificate of discharge in this country," and concludes: "We think that the previous decisions of this court, and of the state courts in the same direction, accord with the true spirit and meaning of the Act of Congress, and with the necessities of our business conditions." (pp. 683–4.)

In this case the judgment of the Court of Appeals of New York was affirmed.

Wolf v. *Stix*, 99 U. S., 1, at page 7, distinguishes that "to come within this exception of the bankrupt act, the debt must be *created* by fraud"; and inasmuch as the whole creation of debt was not by fraud, but the fraud was in an incident, or collateral part, it was held that the debt did not come within the exception. (The judgment of the U. S. Circuit Court was reversed.)

In *Palmer* v. *Hussey*, 119 U. S., 96, at page 98, this court held that "the fraud and trust established by the findings were not of a character to bar the effect of the discharge." * * * * *

"It is clear that, under the ruling of this court in *Hennequin* v. *Clews*, 111 U. S., 679, there was no such fraud in the creation of the debt, * * * as to bar the operation of the discharge."

In *Noble* v. *Hammond*, 129 U. S., 65, this court, at pages 68 and 69, considered the principles of decision so enunciated in *Neal* v. *Clark*, *Wolf* v. *Stix*, and *Hennequin* v. *Clews*, and concluded (p. 70): "The judgment of the Supreme Court of Vermont is in conflict with the *principles* laid down by the decisions of this court, as well as the general drift of those of the several state courts, and is, therefore, reversed."

In *Upshur* v. *Briscoe*, 138 U. S., 365, at pages 376–378, this court reviews the several cases above cited, beginning with the words (p. 376): "The construction "by this court of Section 33 of the bankruptcy Act of "1867 has been as follows" (then follow references to said cases): The court then cites a Massachusetts case (pp. 377–8), which distinguishes between the creation of the debt by fraud, and the effect of associated, collateral or incidental frauds, which did not create the debt.

The case then proceeds to apply the principle of extremely strict construction, to limit other associated words to the narrowest possible application.

If *trusts* within the meaning of the statute, were by construction limited to such as "implied a fiduciary relation existing previously to, or independently of the transaction from which the excepted debt arose," as strict a construction applies also to *the creation of the debt*, referred to in the statute.

In deciding that the words limiting discharge, are to be very strictly construed, and that they do not embrace debts arising from trusts of the character involved, this court, in *Neal* v. *Clark*, 95 U. S., at page 708, quotes from the opinion of the court delivered by Mr. Justice McLean in *Chapman* v. *Forsyth*, 2 How., 202: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. * * The cases enumerated—the defalcation of a public officer, executor, administrator, guardian or trustee, are not cases of implied but special trusts, and the other fiduciary capacity mentioned must mean the same class of

trusts. The act speaks of technical trusts, and not those implied from the contract. A factor is not therefore within the act." The same language was quoted as furnishing one reason for the decision of *Hennequin* v. *Clews*, 111 U. S., at page 679. Applying parallel reasoning to the matters alleged in the declaration of Vehmeyer v. Forsyth, on which the judgment was obtained in 1871, it appears that if Forsyth was not discharged from that debt, very few borrowers or purchasers on credit could have been discharged. Every lawyer who, about the time of borrowing, boasted a little too much of fees earned, every farmer who said he was about to haul his crop to town and that it was a large one, when he intended to haul only part, every merchant who boasted a little too enthusiastically of his sales, at the time of borrowing or receiving credit, would have created by fraud, the debt incurred.

These cases apply very closely to the case at bar. They hold that the line "no debt created by the fraud or embezzlement" of the bankrupt, by association of words, limits the meaning of the word fraud to such frauds as are of the character of or equal moral turpitude with embezzlement; and that this limitation of meaning by the association extends to bar breaches of all ordinary agencies and mercantile and special trusts, from the operation of the section. If culpability, or violation of strict integrity can be spelled out of said declaration, still there was no such creation of the debt by fraud, as these cases require, to annul the discharge in bankruptcy pleaded by Forsyth.

We will now examine more closely the evidence produced by Vehmeyer, held by the courts of Illinois to prove that the debt of Forsyth was created by fraud, within the intent and meaning of the act of congress.

The first abstract named the case "Assumpsit," the second named it "Trespass on the Case."

Actions are ordinarily begun by præcipe, in which the plaintiff's attorney directs the clerk to issue a summons commanding the defendant to answer unto the plaintiff

in a plea of " trespass on the case upon promises " (or any named action) to the damage of the plaintiff of (any sum named). (*Meservey* v. *Beckwith*, 41 Ill., 452, p. 453; *Durham* v. *Heaton*, 28 Ill., 264, p. 271; *Thompson* v. *Turner*, 22 Ill., 389, p. 390.)

All declarations begin with the statement that plaintiff complains of defendant, who has been summoned in a plea of—naming the action thus: trespass on the case —trespass on the case upon promises—assumpsit—or other name. The clerk, who is a ministerial officer, cannot judge from the averments, but takes the name of the action from this naming, or from the praecipe where no narr. is filed. So these abstract clerks take their note from the name given, and the note is not evidence what the declaration contains. If the declaration when filed is variant from the writ, the defendant may waive the variance and plead to the merits, or plead the variance. (*C. & T. C. & R. Co.* v. *Lickiss*, 72 Ill., 521, p. 522; *Messervey* v. *Beckwith*, 41 Ill., 452, p. 454; *1 Chitty Pl.*, 442, 254-5.)

In any event the fact that an action is " trespass on the case " does not tend to prove that fraud is averred in any form. (3 Bl. Com., 158, 159, 122; 2 Chitty's Pleadings, 1-2 " Beginnings and Conclusions of Declarations "; Puterbaugh Common Law Pl., 6th Ed., 882; Same title, 7th Edition, pp. 75-6.)

" Trespass on the case," is, " the form of action at common law, adapted to the recovery of damages for some injury resulting to a party from the wrongful act of another, unaccompanied by direct or immediate force; or which is the indirect or secondary consequence of such act." (*Black's Law Dic.*)

The verdict which is the response to the issue is, in nearly all cases, " guilty " or " not guilty;" and a verdict of guilty does not, in itself, carry any suggestion of fraud. (Puterbaugh Com. Law Pl., 7th Ed., 843.)

The only evidence supposed to show fraud, is the declaration testified to by the witness, and set out in the opinion of the Illinois courts. It reads:

"Henry F. T. Vehmeyer, *complainant*, by Buschel & Frake, his attorneys, complains of Jacob Forsyth, defendant, summoned in a trespass on the case;

"For that whereas, heretofore, to wit: on the 10th day of August, 1868, in order to induce plaintiff to advance him a large amount of money (to wit: the sum of $1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord wood (to wit: 200 cords), cut and piled up near the Pittsburgh and Ft. Wayne, in the County of Lake and State of Indiana, ready to be shipped to Chicago, that one Eldredge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the 200 cords of wood, he the defendant, would immediately ship said cord wood to the city of Chicago: that the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant said sum of $1,000;

"That the defendant shipped only the sum of 40 cords of wood to the said Eldredge, from which he, said Vehmeyer, received the sum of $6 per cord;

"That the representations of the defendant falsely, were false and fraudulent;

"That he did not have, nor never did have, in the county of Lake, and State of Indiana, 200 cords of birch cord wood piled up and ready for shipment to the city of Chicago, to said Eldredge, but only had, neither in the county of Lake, nor anywhere else, the sum of 40 cords of birch cord wood which was shipped by the said defendant to the said Eldredge.

"Wheretore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

In view of the construction given by this court to the provisions of the bankrupt law as to discharge of the debtor, it is necessary that the court examine this declaration, to see whether it proves that the debt was *created by fraud* within the meaning of the bankrupt act.

The first averment towards such fraud is that "in order to induce plaintiff to advance him a large amount of money, (to wit: $1,200.)"

There is no suggestion that plaintiff did advance twelve hundred dollars, but only a less sum.

The substance of the averment is "a large amount of money," the videlicet only limits the amount to the sum named or less, and it might be any sum less than that named. The videlicet is only a parenthetical expression.

The second averment challenges scrutiny.

It begins with the words "falsely and fraudulently represented unto the plaintiff that he had a large amount

of birch cord wood (to wit: 200 cords) cut and piled up rear the Pittsburgh and Ft. Wayne, in the county of Lake, and State of Indiana, ready to be shipped to Chicago."

That was not a representation that he had 200 cords, but only a representation that he had a large amount, not exceeding 200 cords; and it was literally true if he had 40 cords at the place stated, ready as stated. (*Bouvier Law Dic. Videlicet;* 1 *Greenleaf Ev.*, §60; *Stephen on Pleading*, 318; *Brown* v. *Berry*, 47 Ill., 175, p. 177; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

If an action of assumpsit or trover had been brought laying damages at $1,200, averring that defendant bought or converted to his own use, a large amount, (*to wit:* 200 cords), at the price of, or worth, $6 per cord, etc., and general issue had been pleaded, and evidence given that plaintiff sold defendant 40 cords at $6 a cord, or that defendant converted to his own use 40 cords (the property of plaintiff), worth $6 a cord, the verdict in either assumpsit or trover would have been an unqualified verdict of *guilty*; and in either action the jury would have assessed the plaintiff's damages at $240. (*Tidd Pr.*, 869, 870.)

The amount under videlicet is satisfied by proof of a less amount. (*Straight* v. *Hanchett*, 23 Ill. App., 584, pp. 588-9; *Shepard* v. *Ogden*, 2 Scam., 257, p. 259.)

The third averment is: "That one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when shipped."

It is noticeable that the witness started to testify that the averment was that *he* had contracted to sell to Eldredge, but he retracted that as wrong, and substituted that Eldredge had contracted to purchase said wood; that is—"a large amount, (to wit: 200 cords)," when it should be shipped.

It is also noticeable that *no one contracted to ship that or any wood to Eldredge.*

The fourth averment is: "that if the plaintiff would

advance to him at the rate of five dollars per cord for the 200 cords of wood, he, the defendant, would immediately ship said cord wood *to Chicago.*"

But it is to be noticed that *there was no suggestion that Vehmeyer should receive the wood, or have anything to do with it, or with any of the proceeds, or that Forsyth should sell it after it should reach Chicago.*

The fifth averment is: "That the plaintiff, Vehmeyer, relying upon the representations being true, advanced to the defendant said sum of $1,000."

It is to be observed that *Vehmeyer took no security upon the wood; that he asked no more right or interest in it or its proceeds than on defendant's clothing; and that defendant did not promise to pay him one penny that he might receive for it.*

The sixth averment is: That Forsyth actually shipped 40 cords of wood to Eldredge, from which Forsyth paid Vehmeyer $240.

(Whether this 40 cords was birch wood or where it was shipped from is not averred.)

The seventh averment is: "That the representations of the defendant falsely were false and fraudulent."

That is not an averment of fraud. What representations were averred to be "falsely" do not appear; but the averment is in effect that only such representations as were falsely made were fraudulent, without specifying any as false, except in the next subsequent averment.

The eighth averment is: "that he did not have, nor never did have, in the county of Lake and State of Indiana, 200 cords of birch cord wood piled up and ready for shipment to the city of Chicago *to said Eldredge*, but only had 40 cords of birch wood, which was shipped by said defendant to said Eldredge."

The whole sentence is to be taken together. *The words describing what he did not have are words of essential description. Forsyth may have had 200 cords of birch cord wood piled up and ready for shipment to Chicago* to himself, for all that there is in that averment. (Authorities *post.*)

The 2d averment had been that he represented to the plaintiff that he had a large amount of birch cord wood, not exceeding 200 cords, cut and piled up, ready to be shipped *to Chicago.* "This eighth averment is that he did not have 200 cords of birch cord wood piled up and ready for shipment *to Eldredge;* but that he did actually ship 40 cords to Eldredge. This admits that if he did not have 200 cords, he did have a large amount, not exceeding 200 cords (that is, to wit: 200 cords).

There was no averment that Forsyth had no other property in Illinois, or that this wood should be so placed that Vehmeyer could levy on it if he should get judgment.

The whole averment only amounts to a vague promise that if Vehmeyer would lend him $1,200 he would hurry around and get some goods into a market town, which he said he had in an adjoining county. And that was all.

Vehmeyer lent him $1,000, and did not seek in any way to connect the wood with the loan. He was to have no control of or connection with or security on it. The loan was a simple unsecured loan to Jacob Forsyth, for which he did not even take a promissory note.

If as collateral to that debt he had taken Forsyth's agreement to ship 200 cords of wood to Chicago and sell it, and pay the money over to him, and Forsyth had sold the wood and kept the money, all the above cases show that his discharge in bankruptcy would have been absolute; and this declaration shows nothing like an embezzlement, or fraud within the meaning of the bankrupt act.

The last clause of the declaration given is: "Wherefore the plaintiff asks damages to the extent of $1,500, and hence he brings this action of fraud and deceit against the defendant."

Those words "fraud and deceit" are no part of any averment, and have no effect at all, being mere surplusage.

Ayers v. Richards, 12 Ill., 146, p. 148.
Puterbaugh's Pl. Common Law, 6th Ed., 832.
2 Chitty's Pleadings 1–2, 4.

Upon that declaration with general issue pleaded, if Vehmeyer had proved that August 10, 1868, he loaned Jacob Forsyth $1,000, and had received $240 dollars from Forsyth, paid thereon, what would have been the Verdict?

Clearly: "We the jury find the defendant guilty; and assess the damages at $——" (naming the amount of money due.)

No evidence would have been required to be given upon any of the collateral averments, or upon any averment aside from those of the mere loan of the money.

Lusk v. Cook, Breese, 84.
Burnap v. Wight, 14 Ill., 301, p. 303.
Hiner v. Richter, 51 Ill., 299.
1 Chitty's Pleadings, 232, 233.

If the debt had been created by fraud, it could not have been proved without proving the fraud. As the judgment proved could have been got, on that declaration, without any evidence of fraud, that judgment, read in evidence, is not evidence that the debt was created by fraud.

Wells on Res Adjudicata, Sec. 3, 203, 213, 214, 215, 216, 224, 226, 227.
2 Smith's Leading Cases. Hare & Wallace Notes, 794.
McCall v. Carpenter, 18 How., 297, p. 302.
Washington Packet Co. v. Sickles, 5 Wall., 580, p. 592.
Russell v. Place, 94 U. S., 606, pp. 608–610.
Wood v. Jackson, 8 Wend., 9.
Althrop v. Beckwith, 14 Ill. App., 628, pp. 632, 633, 634.
Mervin v. Lewis, 90 Ill., 505, p. 509.
Riverside Co. v. Townshend, 120 Ill., 9, pp. 17, 18.
Chicago v. Cameron, 120 Ill., 447, p. 459.
Atty. Gen. v. C. & E. R. R. Co., 112 Ill., 520, p. 539.
Umlauf v. Umlauf, 117 Ill., 580, p. 587.
1 Black on Judgments, Sec. 611, 624.

Warner v. *Cronkhite*, 6 Bissell, 453, supports the last above proposition with clear reason and authorities. It was decided in the Eastern District of Wisconsin:

At page 458 the court says: "Now in the case at bar what does the record show? The complaint in the action, in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations *in an exchange of property*. It was not an action *upon contract, with immaterial allegations of fraud*, but it was an action grounded *solely upon the fraud.*

* * * *

As the record of the action shows *a material and traversable allegation of fraud as its sole foundation*, the debt or demand may fairly be said to be one of fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him. *In re Whitehouse*, 4 Nat. Bankruptcy Register, 93."

The distinction is apparent: for the action of Vehmeyer against Forsyth in 1871, was upon a contract to repay money loaned, with immaterial allegations intended to give a color of fraud, and discredit the defendant: allegations which were not material or traversable. There is no form of pleading, in which the defendant could have traversed the so-called allegations of fraud, so as to bar the action. If Forsyth should have attempted to traverse the averments of fraud only, the plaintiff would have taken judgment *nil dicit*, on the contract, for the amount due on the loan. (1 Tidd. Pr., 562.)

Pages 458-9 (continuing): "*The distinction must not be ignored* between the question as it presents itself in the case at bar, and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial." (The case of Vehmeyer v. Forsyth, sct.) * *

"Upon the record it would seem, that, *had there been no fraud, there could have been no claim*, and had there been no fraud, and consequently no claim, there would have been no judgment."

Thus the distinction between that case and the judgment of Vehmeyer v. Forsyth, is apparent. The claim in Vehmeyer's declaration on the contract of the borrower, was not at all affected by the supposed fraudulent representations. The declaration would have been as complete without any averment of such representations as it is with them in it, as printed above.

This is further made apparent by the review of certain New York cases:

Pages 459, 460, referring to *Wood* v. *Henry:* "In that case, the

defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. * *

A majority (6 to 2) of the court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, proof of the fiduciary relation was not indispensable to recovery. Here is a plain distinction, between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was in short the sole cause of action.

Prouty v. *Swift*, 51 New York, 594, is in character and principle like *Wood* v. *Henry*, while *Roberts* v. *Trosser*, 53 New York, 260, enforces the principle applied in the case at bar as distinguished from the other cases cited."

Page 461: "In the case of *Palmer* v. *Preston*, 45 Vermont, 154, cited by defendants' counsel, the action was upon contract. *Fraudulent representations had been made to procure a certain indorsement*, but the fraud was not the foundation of the judgment."

This Vermont case seems to be like the one supposed in the declaration of Vehmeyer v. Forsyth (of 1871), which alleges that certain supposed fraudulent representations were made by Forsyth to procure the loan of the money, but they were not the creation of the debt, or even necessary to the cause of action or judgment.

The cases so cited and reviewed by the United States Court for Wisconsin (when both Judge Drummond and Judge Davis participated in the preparation of opinions on such general points, for precedents in the circuit) contain some matters peculiarly applicable to the consideration of the evidence in this case, held by the Illinois courts to prove that the debt of Forsyth was created by fraud, which may be cited from the reports themselves.

Whitehouse, petitioner, 4 National Bankruptcy Register, 63 (published as a leading case in 29 Federal Cases, 1,032).

LOWELL, J. (with Judge Shipley): "The bankrupt was arrested on an execution issued from the Superior Court. The record of that court, if admissible, shows that the judgment was based upon a verdict rendered in an action for deceit, and was rendered before the bankruptcy.

* * * * *

"The civil action, in which he is arrested, is distinctly and *solely* founded on fraud, and so is within the equity of the exception of section 33.

* * * * *

"We are of opinion that the record of the action * shows *a material and traversable allegation of fraud as its sole foundation.*"

Wood v. Henry, 40 N. Y. (1 Hand.), 124: A declaration or complaint alleged that defendants, as commission merchants, received certain property from plaintiffs, for sale; that they sold the property and kept the money. Judgment was taken by default. Executions against the bodies of defendants were issued, which were set aside by the trial court (pp. 124, 125), and that order having been affirmed by the Supreme Court at general term, was removed into the Court of Appeals. In affirming the judgments, the Court of Appeals said:

Page 128: "In the present case it may have been wholly impossible for the defendants to deny that they owed the money claimed by the plaintiff, or that the consideration of the indebtedness was the receipt of moneys arising from the sale of the plaintiff's goods. And yet they may be quite able to show that they were not commission merchants, and that the circumstances under which they acted did not establish any fiduciary relation between them and the plaintiffs, but the relation of debtor and creditor merely. If so, then by no possible answer which the defendants could truthfully interpose could they have prevented judgment for the plaintiff for the amount claimed. Admitting the debt, they could not demand a trial to determine the extrinsic facts, when the jury must necessarily have found a verdict for the recovery of the money. We have no provision for the trial of such collateral questions, and no warrant for a judgment other than that the plaintiffs recover so much money, with costs."

That precisely expresses Forsyth's predicament when summoned on the above copied declaration of 1871.

In *Prouty* v. *Swift*, 51 N. Y., 594, the opinion is by the only judge who dissented on this point in *Wood* v. *Henry*, and refers to a declaration much like that of Vehmeyer v. Forsyth, of 1871.

Page 601: "The only other question remaining to be considered is raised by the exception to the referee's finding of law, that the defendants acted in a fiduciary character, within the meaning of subdivision 2 of Sec. 179 of the code.

That was not warranted by the issues which he was called upon to try. The character or nature of defendants' employment was not an issuable fact. This I deem to be settled by the decision of *Wood* v. *Henry*, 40 N. Y., 124. It was wholly immaterial to the plaintiffs' right of recovery, whether the legal liability, which the defendants had incurred, resulted from a fiduciary re-

lation, or that of debtor and creditor merely, in the ordinary and common acceptation of those terms. The action was, substantially, so far as it related to the demand for the recovery of the money in question, one for money had and received to and for the plaintiffs' use; and he would have been entitled to a judgment therefor, notwithstanding a finding by the referee (in case he had so found) that the defendants did not act in a fiduciary capacity."

Roberts v. *Prosser*, 53 N. Y., 260, was decided as follows:

Page 263: "Wood v. Henry, 40 N. Y., 124, * went upon the ground that a recovery might have been had under the allegations of the complaint without showing any fiduciary relation between the parties. In the action now in question it is very clearly otherwise."

Palmer v. *Preston*, 45 Vermont, 154, goes upon the same distinction. The question decided was that the debtor was discharged by his certificate in bankruptcy.

Page 156: The vital question in the case is whether the debt sought to be collected in this suit was created by fraud. If so, the defendant's discharge in bankruptcy is no bar to the enforcement of its payment by the court.

If the record of the judgment in suit is examined, it will be found, that the debt, evidenced by the judgment, was created by the contract which the defendant entered into.

Page 157: "The defendant would not now be allowed to impeach the judgment, by showing *that no such contract, as the record of the judgment discloses*, existed between the testatorand himself, or that the indebtedness, evidenced by the judgment, was created by fraud, *and not by contract*."

Page 158: The court quotes from the case of *Whitehouse*, where it holds, that ifthe declaration shows a material and traversable allegation of fraud as its *sole foundation*, the debt or demand may fairly be said to be founded on fraud: but proceeds on page 159 to follow the decision of Judge Nelson (of this court), that where the judgment shows that the debt sought to be enforced was *created by contract* (and not by fraud) it imports verity, and the plaintiff cannot afterwards claim that it was created by fraud, even though in his declaration, on which that judgment was obtained, he had alleged any amount of fraudulent statements of the debtor, to induce the creditor to enter into the contract, on which he had obtained his judgment.

These cases lead to the conclusion (as shown in *Prouty* v. *Swift*), that the court, in the trial of 1871, upon the above printed declaration, at issue by any plea that could put it at issue, would have entered judgment for the plaintiff, if the jury had found the following special verdict:

We the jury find that on the 10th day of August, 1868, the plaintiff (Vehmeyer) loaned one thousand dollars to the defendant (Forsyth), that to induce the plaintiff to advance said money to him, the defendant represented unto the plaintiff that he had

a large amount of birch cord wood cut and piled up near the Pittsburgh, Fort Wayne & Chicago Railway, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood at six dollars per cord, in the city of Chicago, when it should be shipped into said city; and that if Vehmeyer the plaintiff would advance to him five dollars per cord for two hundred cords of said wood, he (defendant) would immediately ship said cord wood to the city of Chicago; that the plaintiff (Vehmeyer) relied that the representations of the defendant were true, and believed that he would do as he agreed; that at the time stated, said Forsyth had more than two hundred cords of birch cord wood, cut, and piled up near said Railway, at the place stated, ready to be shipped to Chicago; that one Eldredge had contracted to purchase said wood in the city of Chicago, at six dollars per cord, from time to time, and whenever it should be shipped into said city; that a few days after said loan was made, said Vehmeyer offered to receive said wood in the city of Chicago for said Forsyth, and sell and deliver the same to said Eldredge upon payment by said Eldredge from time to time of the sum of six dollars per cord therefor, as he had contracted with said Forsyth; that thereupon said Forsyth began shipping said wood to said Vehmeyer in said city of Chicago, and said Vehmeyer so received from said Forsyth and sold to said Eldredge, under said contract 45 cords of said wood for which he received six dollars per cord, amounting to $270; that said Eldredge then being unable to procure cars for transportation of said wood to his lime kilns, refused to purchase or receive any more of said wood; and said Vehmeyer notified said Forsyth, and directed said Forsyth to ship no more of said wood to him, said Vehmeyer. Said Forsyth never shipped any of said wood to said Eldredge. That deducting his charges for receiving and selling said wood, said Vehmeyer has credited to said Forsyth the sum of $166.65 out of said $270 so received.

If upon the foregoing facts the law is with the plaintiff, we find for the plaintiff and assess his damages at $833.35; and if the law is with the defendant we find for the defendant.

Upon that verdict the court would have entered judgment for the plaintiff.

It seems to be demonstrated that the averments of the declaration supposed to show fraud, are immaterial, not traversable, and that the judgment does not tend to show that the debt was created by fraud within the meaning of the Bankrupt act.

The law is, that the burden of proof as to the former issue is on the person who sets up the judgment, and *he must make it clear and decisive* (WELLS *on Res. Adj.*, Sec. 215); and "*a judgment is* NO EVIDENCE *of matter to be inferred from it by argument.*" (WELLS on *Res Adjudicata*, Sec. 216.)

"*A judgment is* NO EVIDENCE *of a matter which comes collaterally in question merely, nor of matter incidentally*

cognizable, or to be inferred only by argument, or construction, from the judgment."

Lawrence v. Hunt, 10 Wend., 80, pp. 83, 84.
Wells on Res Adjudicata, Sec. 200, 201, 202, 224.
Broom's Legal Maxims, 335.
2 Smith's Leading Cases, Hare & Wallace Notes, 793 (*677).

It is apparent that the question at issue and tried in the case of Vehmeyer v. Forsythe in 1871, was not the same question which is at issue in the present suit, upon the averments to overcome the effect of a discharge in bankruptcy in 1880, duly pleaded and proved.

In 1871 there had been no proceedings in bankruptcy, and the question whether the debt had had been "created by fraud" according to the true intent and meaning of the bankrupt act could not have arisen.

To make the judgment of 1871 an estoppel and res adjudicata on that point, that point must have been *a vital issue* on the former trial, as said by Black in Sec. 226 above quoted. It could not have been an issue at all; and whether that judgment was for tort or on contract is wholly immaterial to the question and issue raised for the first time (for the confession and avoidance of the plea of discharge), by the reply that *the debt alleged was created by fraud within the meaning and intent of the bankrupt act.*

To apply the maxim, *transit in rem judicatam*, it is essential that the question decided in the former action be *the same question* now raised; it must be *the same point.* "The conditions * * are, that *the same identical matter* shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." "The judgment * * *directly upon the point*, is * conclusive between the same parties, upon the same matter directly in question in another court, * * (or) coming incidentally in question in another court, for a different purpose. *But neither* the judgment of a concurrent or exclusive jurisdiction *is evidence of any matter which came collaterally in question* * * *nor of any*

matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

BROOM'S LEGAL MAXIMS, 328, 331, 334, 335.

It is not necessary to the conclusiveness of the former judgment, that issue should have been taken upon the precise point which is controverted in the second trial; it is sufficient, if that point was *essential to the finding of the former verdict.*" (1 GREENLEAF ON EV., Sec. 534.)

That the debt of Forsythe was created by fraud within the intent and meaning of the bankrupt act, was not a point *essential* to the finding of the former verdict. Even the point that there was any fraud at all in obtaining the credit by Forsyth was not a point *essential* to the finding of the former verdict; that point could only be inferred by argument from the declaration and judgment; it was only incidentally cognizable by the jury because it was suggested in the declaration, but as it was not essential to the finding of the verdict which the jury found, nor to the judgment which was entered, it only came collaterally in question.

Let us return to a more comprehensive analysis of this declaration, which will further demonstrate that *there was no fraud, in the creation of the debt, alleged in that declaration.* The declaration is that—

"To induce plaintiff (Vehmeyer) to advance him (Forsyth) a large sum of money, (to wit: the sum of twelve hundred dollars)—falsely and fraudulently represented unto the plaintiff, that he had a large amount of birch wood (to wit: two hundred cords) cut and piled up near the Pittsburgh and Ft. Wayne in the county of Lake and State of Indiana, *ready to be shipped to Chicago;* that one Eldredge had contracted to purchase said wood at six dollars per cord in the city of Chicago when shipped; and that if Vehmeyer, the plaintiff, would advance to him at the rate of five dollars per cord, for the two hundred cords of wood, he, the defendant, would immediately ship said cord wood *to the city of Chicago.*"

"That the plaintiff, Vehmeyer, relying upon the representation being true advanced, to the defendant, said sum of one thousand dollars."

There is no averment that the defendant did not have a large amount of birch wood cut and piled up as stated ready to be shipped to Chicago. There is no averment that he did not have two hundred cords so ready to be shipped *to Chicago.*

There is no averment that Eldredge had not contracted *to purchase* said wood, at six dollars per cord, *in Chicago,* when shipped.

There is no averment that Forsyth did not immediately ship said cord wood *to the city of Chicago.*

NOTE: The purchase by Eldredge was to be *in Chicago;* the wood was to be shipped to Forsyth himself or to some agent for him; and if Eldredge should purchase, as he had contracted to do, he would pay cash on delivery of the wood. Eldredge was neither to pay for the wood before its delivery; nor was Forsyth to allow the carrier to deliver the wood to Eldredge without payment of the price of the wood.

The only averment having the form of a traverse of the alleged representations, lacks the substance, it is as follows:

"That the representations of the defendant falsely were false and fraudulent; that he did not have, nor never did have, in the county of Lake and State of Indiana *two hundred* cords of birch cord wood, piled up, and ready for shipment to the city of Chicago, *to said Eldredge;* but only had forty cords of birch cord wood, which was shipped by the said defendant, *to said Eldredge.*"

NOTE: That averment was true if he had an hundred and ninety-nine cords; or if he had two hundred cords, and it was not all piled up; or if he had it piled up for shipment to Chicago to himself, or to any one else, to be sold to said Eldredge according to his contract to purchase it *in Chicago.* That averment was true if forty cords were delivered to Eldredge, and he refused to take any more.

The qualifying words, are specific words, they limit the general words; they are necessary to be considered

to determine what was averred; and those words being considered, the averment does not traverse the truth of the statements Forsyth is alleged to have made to induce the loan of the money. (*Bally* v. *Kenrick*, 13 Price, 291; *Tipping* v. *Clark*, 2 Hare, 383, 390; *King* v. *Ray*, 11 Paige, 235, 239; *Davis* v. *Mapes*, 2 Paige, 105, 106.)

In an answer in chancery, to an interrogatory in the bill, a negative pregnant, will only evade the question: an answer which adds *a qualification* to the matter alleged or traversed evades the allegation and is impertinent (*Ibidem*, *Cooper's Equity*, 313; *Mitford's Eq.*, 250; 1 *Daniels Ch. Pr.*, 4th Ed., 725 and note), and certainly, where it is alleged that certain representations were made to induce a person to lend money, the declaration must traverse the truth of those identical representations, must state that the plaintiff relied on the truth of the representations, must state what of those representations were untrue, and cannot shift the ground, evading the truth of those representations, and substitute either a pregnant denial, which admits the truth of the general statement, or an averment that a different or qualified matter did not exist.

NOTE. That the averment, with the qualifying words, did not traverse the truth of the representations alleged to have been made by Forsyth (in that declaration of 1871) is illustrated by testimony actually given, and by testimony offered in the trial court in this case and contained in this record:

Robert C. Forsyth testified that he heard the instructions given to the jury (in the 1871 trial). That he heard the judge say that there had been no fraud proven, that Vehmeyer was receiving the wood, and declined to receive any more.

John Marshall testified that he was a witness on the trial of 1871, and remembered some of his testimony. Forsyth's attorney then offered to prove by him that he testified that Forsyth had more than the two hundred cords of wood at the time Vehmeyer claimed that he wanted it; that Vehmeyer was then handling and cutting wood for Forsyth at Cassello, Indiana; and that Vehmeyer instructed the witness not to ship any more wood

to him on account of Forsyth. Also that he had Vehmeyer testify at that trial, that he (Vehmeyer) had ordered Forsyth not to ship any more of the wood. (The court excluded this evidence.)

Jacob Forsyth being on the stand was asked, whether or not at the time the money is alleged to have been paid to him by Vehmeyer on account of this wood, he had 200 cords and more in his possession. This was coupled with an offer to prove by him that at that time he had more than the 200 cords of wood there, which he was ready and willing to deliver to Vehmeyer; and that after about 45 cords of this wood had been shipped he ordered Forsyth not to ship any more, because he (Vehmeyer) could not get cars to reship it, etc.

Non constat but the declaration of 1871 was drawn with its peculiar wording, because Vehmeyer could not deny that every representation made by Forsyth when he borrowed the money was true; and that seems very probable in view of the above testimony given, and that offered with the witnesses upon the stand to answer the questions asked, and excluded.

SECOND.

The courts of Illinois erred in excluding the evidence offered by Forsyth, tending to show that the judgment, of 1871, was upon the debt only and did not embrace a question whether that debt was created by fraud within the meaning and intent of the provision of the bankrupt law of the United States.

Defendant offered competent evidence tending to show that the plaintiff, Vehmeyer, did not make any claim of fraud on the trial in 1871, and that such point or question was not adjudicated at that trial; and that Vehmeyer himself testified that Forsyth had the wood and shipped part of it, and he (Vehmeyer) stopped him from shipping more.

These offers of evidence assumed a variety of forms.

It also appears that defendant (Forsyth) offered to prove by competent evidence that the court instructed

the jury that no fraud had been shown in the case, and that it was the duty of the jury, simply to determine the amount, if any, which Forsyth owed to Vehmeyer.

Exclusion of the evidence was error.

Wells on Res Adjudicata; Sec. 200, 201, 215, 216, 297, 302.

Lawrence v. Hunt, 10 Wend., 80, p. 84.

Wood v. Jackson, 8 Wend., 9, p. 36.

2 Black on Judgments, Sec. 624.

1 Greenleaf on Ev., Sec. 532.

"Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground."

2 Black on Judgments, Sec. 628.

"Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if upon the whole record it remains *doubtful whether the same subject-matter was actually passed upon*, it seems that parol evidence may be received to show the truth."

1 *Greenleaf on Evidence*, Sec. 532.

Greenleaf divides the section here, and proceeds: "So also, if the pleadings present distinct propositions," showing that the clause above quoted applied to where the propositions are not distinct, and judgment may be given on proof of part of the averment, as in the instance at bar where it could be given on proof of the loan without any evidence of any fraud to induce the loan.

The courts of Illinois erred in excluding testimony as to what evidence was given on the trial in 1871.

In *Hitchin* v. *Campbell*, 2 W. Bl., 827, at page 831, the court says:

"But the principal consideration is, whether it be precisely the same cause of action in both, appearing by

proper averments in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is that the same evidence will sustain both the actions. Putt v. Royston, 2 Shaw, 211; Payne, 472; 3 Mod., 1; Polfexen, 634; Mortimer v. Wingate, Moore, 463; Bro., Action on the case, 97, 105. These relate to the whole of the demand; but the same reasoning extends to a part of it only; as 4 Co., 92 b, Slade's case."

"Lord Eldon, Ch. J., said that this was the true test. Martin v. Kennedy, 2 Bos. & P., 71."

Wells on Res Adjudicata, Sec. 201, 203.

Washington Packet Co. v. *Sickles*, 5 Wallace, 580, where it cites

Wood v. *Jackson*, 8 Wend., 36, etc.

The instructions of the court, by which the case was submitted to the jury were competent evidence of what was submitted for their judgment. The jury were bound to follow such instructions. The court, in sending them out to deliberate, may have instructed them: "There is no evidence tending to show any fraud, and you have nothing to do with any claim of fraud: all you have to decide is whether Vehmeyer lent Forsyth money, and if so how much, and to deduct $240 for wood that Vehmeyer admits he has received from Forsyth.

If you find that Vehmeyer did not lend Forsyth any money the form of your verdict will be: 'We the jury find the defendant not guilty.'

If you find that Vehmeyer did lend Forsyth money, the form of your verdict will be: 'We the jury find the defendant guilty, and assess the plaintiff's damages at $———;' naming the amount you find due."

If the court so instructed the jury on the case, that shows the precise matter adjudged by the jury. *It is the province of the court* to determine what are the actual issues,—on what questions there is any evidence, and to limit their consideration to those matters.

Judge MERRIFIELD (who tried the case in the Illinois

courts) has prepared the following specific reply to the brief in support of the motion to dismiss the writ of error:

> Counsel for defendant in error advance this proposition: "It is apparent on the face of this record that no question of law "raising" (involving) "any Federal question was decided in this case; and that the decision in the Supreme Court of Illinois adverse to the defendant was solely upon questions of fact. The validity of the Bankrupt Act of 1867 was not denied. The right of the defendant by virtue of having been discharged under that law to all protection and immunity given by that law was not questioned. The law itself provides (Bankrupt Act of 1867, U. S. Rev. Statutes, Sec. 516) that 'no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged by proceedings in bankruptcy,' etc. The only question raised in this case relating to the statute of the United States was whether or not the claim sued upon was based upon the fraud of the defendant. This was purely a question of fact put at issue by the pleadings and to be determined upon the evidence in the case."

That is to say, the question whether a certain state of facts constitutes fraud within the meaning of that term in the statutes of the United States, cited, is not a question of law at all, but a simple question of fact, in reference to which, this court is precluded, by the judgment of the state court, from making a decision. The proposition, when thus nakedly but fairly and fully stated, would scarcely seem worthy of serious attention.

The cases cited by counsel for defendant in error are either not in point or unfavorable to their proposition.

In *Dower* v. *Richards*, 151 U. S., 658, Mr. Justice GRAY delivering the opinion of the court, says: "When indeed the question decided by the state court is not merely on the weight or sufficiency of the evidence to prove the fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice CATRON: 'The powers of the Supreme Court are limited in cases coming up from the State Courts under the 25th section of the Judiciary Act to questions of law, when the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where *their construction* is drawn in question or an authority exercised under them; and as the admission of evidence to establish the mere fact of a boundary in re-

gard to the extent of a grant can not raise a question involving either the validity or construction of an Act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be, in admitting the evidence to establish the fact; but when evidence is admitted as competent for this purpose and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of the state courts of the effect of such evidence may be fully considered here and their judgments reversed or affirmed in a similar manner as if a like question had arisen in the Supreme Court of Error of a state when reversing the proceedings of inferior courts of original jurisdiction."

"*Macky* v. *Dollon*, 4 How., 421, 447: The only question considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an Act of Congress." From the concluding statement of the opinion it appears that this court held they could not review the decision of the state court upon the question of fact whether a certain gold ledge in controversy at the time when a certain town site patent took effect was known to be valuable for mining purposes; and the only question of federal law in the case having been rightly decided by the court below, this judgment was affirmed.

In *Egan* v. *Hart*, 165 U. S., 188, the finding of the trial court assented to by the Supreme Court of the state, was that the stream across which the dam complained of was erected was non-navigable; and this was held to be a finding of a fact, which was conclusive, and afforded ground broad enough on which to maintain the judgment below, independent of any federal question, and this court was consequently without jurisdiction.

The case of *Bartlett* v. *Lockwood*, 160 U. S., 357, is too obviously inapplicable to need any attention. The same remark applies to *Quinby* v. *Boyd*, 128 U. S., 480; *River Bridge Company* v. *Kansas P. R. Co.*, 92 U. S., 315; *Martin* v. *Marks*, 97 U. S., 345; *Kenney* v. *Effinger*, 115 U. S., 577.

There are a number of decisions of this court precisely in point, which are a complete answer to the contention of counsel for defendant in error.

The case of *Neal* v. *Clark*, 95 U. S., 704, was brought into this court on a writ of error to the highest court of the State of Virginia. The only question involved in the case was precisely like that involved here, namely, the meaning of the word fraud in the 33d section of the Bankrupt Law of 1867. The court below found and held that Neal, the plaintiff in error, was not entitled to the benefit of his discharge in bankruptcy because he had been guilty of constructive fraud in buying assets from the executor of the estate at a discount when the needs of the estate did not require it. On this question this court differed from the Supreme Court of Appeals of the State of Virginia and reversed their judgment. So, too, in *Hennequin* v. *Clews*, 111 U. S., 676. The only question decided by the court below was, that one hypothecating (to secure a debt due from himself), securities which had been pledged to him to secure the obligations of another, and failing to return them, when such obligation was discharged, did not thereby create a debt by fraud or in a fiduciary capacity which is exempted by Section 5,117 Revised Statutes from the operation of a discharge in bankruptcy.

The Superior Court of the City of New York rendered this judgment, from which an appeal was taken to the Court of Appeals of New York, which affirmed the judgment and remitted the record to the Superior Court of the City of New York, to which court accordingly the Writ of Error from this court was directed. The judgment of the Court of Appeals was affirmed by this court, not on the ground that it was conclusive and precluded this court from jurisdiction, but on the ground that it was sound in principle and a correct construction of the law, as it had been construed in a number of cases by this court.

Palmer v. *Hussey*, 119 U. S., 96, was also a Writ of Error to the Supreme Court of the State of New York. The record shows that on the 18th of April, 1874, Palmer recovered a judgment in the Supreme Court of New York against Hussey for $32,128.57, on account of certain bonds of the United States which had been placed in the latter's hands by Palmer, for which he gave a writing showing that he held the bonds subject

to the order of said Palmer at ten days' notice, and that he was to collect the coupons free of charge, etc. The complaint set forth the writing, and alleged that the bonds were received by the defendant from the plaintiff as his agent and broker in a fiduciary capacity, upon the agreement and arrangement contained in said writing: "That the defendant, without the authority or permission of the plaintiff, has fraudulently and wilfully sold and disposed of and misapplied the said bonds and has refused to deliver up the same to said plaintiff, who has frequently demanded the same from him and given the notice so to do," etc. The complaint was denied by the Answer. In May, 1880, Hussey received his final discharge in bankruptcy, and in June following he moved the Supreme Court to enjoin the collection of the judgment in favor of Palmer because of said discharge. The Supreme Court (both special and general term) denied the motion on the ground that the judgment on its face showed that the debt was created by fraud, and while Hussey was acting in such a fiduciary capacity as to prevent the discharge in bankruptcy from operating as a release. This order on appeal was reversed by the Court of Appeals, and the execution of the judgment perpetually enjoined because the fraud and trust established by the findings were not of a character to bar the effect of the discharge in bankruptcy. To reverse that judgment a Writ of Error was sued out from this Court. Hussey moved to dismiss the Writ, on the ground that no Federal question was raised or decided, and with this motion he united a motion to affirm the judgment of the Court of Appeals. This court denied the motion to dismiss, and granted the motion to affirm. Mr. Chief Justice WAITE, delivering the opinion of the court, said: "Upon the facts as they appear in the record sought to be enjoined, it is clear that, under the ruling of this court in Hennequin v. Clews, 11 U. S., 676, there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the bonds by Hussey as to bar the operation of the discharge.

Noble v. *Hammond*, 129 U. S., 65, is another case precisely in point against the contention of counsel for de-

fendant in error. It was a writ of error to the Supreme Court of Vermont. The action was brought in a County Court of Vermont; a discharge in bankruptcy was pleaded by the defendant; but the court instructed the jury that the defendant was entitled to no benefit from his discharge on the ground that he had received the money in question in a fiduciary capacity. The Supreme Court of Vermont affirmed the judgment of the County Court, on the ground that, while the instruction of the court below was technically erroneous, it was harmless, because the act of the defendant in mingling the money with his own and using it was a wrongful and fraudulent act, which created a debt, that was not discharged by defendant's composition with his creditors, under the provisions of the bankrupt law. This Court reversed the decision of the Supreme Court of Vermont, and held that the facts in the record did not constitute "the actual positive fraud contemplated by the bankrupt act, and only such an implied fraud as is involved in most or all cases of conversion of property and breach of contract."

Upshur v. *Briscoe*, 138 U. S., 365, was a Writ of Error to the Supreme Court of the State of Louisiana, and involved a question of what are debts created by a bankrupt while acting in a fiduciary character so as not to be discharged under Section 33 of the Bankrupt Act of March 2d, 1867, Chapter 176. This case, as the others, clearly shows that the Writ of Error in this case was properly issued.

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